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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-64

ALCO-GRAVURE, INC.,
Appellant Below and Petitioner,

vs.

THE BALTIMORE AND ANNAPOLIS RAILROAD COMPANY AND ELMER J. JUBB,
Appellees Below and Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner, Alco-Gravure, Inc. (Alco), seeks this Court's review of a decision of the United States Court of Appeals for the Fourth Circuit affirming *per curiam* the dismissal by the United States District Court for the District of Maryland of its claim for damages allegedly arising from the cessation of the rail service of Respondent, Baltimore and Annapolis Railroad Company (B&A).[1] The District Court dismissed on the ground that Alco, having initiated

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[1] Respondents have filed a Petition for a Writ of Certiorari in respect of the Fourth Circuit's simultaneous affirmance of the District Court's finding, resulting in the issuance of a mandatory injunction, that cessation of B&A rail service was in violation of the Interstate Commerce Act (October Term, 1976—No. 76-78). Respondents submit this if this Court is to review the dismissal of Alco's damage claim it should consider also the finding below that cessation of B&A rail service constituted a violation of the act, as such finding forms the basis of both the damage claim and the injunctive order.

its damage claim in the first instance by complaint to the Interstate Commerce Commission (the Commission), was precluded by Section 9 of the Interstate Commerce Act (49 U.S.C. § 9) from thereafter prosecuting that claim in court.

As will be shown herein, the dismissal of Petitioner's damage claim was entirely proper; and Petitioner has failed to establish special and important reasons for invoking this Court's jurisdiction on writ of certiorari.

Statement of the Case

Prior to June of 1972, B&A, whose principal business is the charter bus business, operated a six-mile line of railroad between Baltimore and Glen Burnie, Maryland. On June 23, 1972, tropical storm "Agnes" destroyed the Patapsco River Bridge over which B&A operated that line of railroad. B&A promptly secured estimates indicating that the cost of repairing the Bridge, as well as segments of track which had been washed out, would be in excess of $100,000.

Because the railroad was a deficit operation, sustaining a net loss of $46,171 during the period 1963-1971, B&A management knew that an expenditure of that magnitude could not be economically justified. B&A therefore sought the financial assistance of Alco, the only rail user of any consequence south of the Patapsco River. Discussions with Alco focused on the possibility of a $50,000 loan, secured by a first mortgage on B&A's right of way. B&A also had discussions with the Baltimore and Ohio Railroad (with which it connects at the north end of its line), exploring the possibility that the B&O take over all or a portion of B&A's rail operation.

All such discussions terminated when Alco filed with the Commission a complaint seeking an order compelling B&A to restore rail service and an award of damages for

violation of Sections 1(4), 1(11) and 1(18) of the Act.[2] B&A had no choice at that point but to seek Commission authorization to abandon rail operations, which it did by application filed January 11, 1973.

B&A's abandonment application was consolidated with Alco's complaint and the consolidated proceedings were to be heard in early July 1973. However, on June 21, 1973, the United States District Court for the Southern District of New York ruled that the Commission must at the outset of all abandonment proceedings determine whether "major Federal actions significantly affecting the quality of the human environment" are involved within the meaning of the National Environmental Policy Act of 1969. *Harlem Valley Transportation Ass'n.* v. *Stafford*, 360 F.Supp. 1057 (S.D.N.Y. 1973), *aff'd* 500 F.2d 328 (2d Cir. 1974). This ruling resulted in an indefinite postponement of B&A's abandonment case, as well as many other abandonment cases then pending, while the Commission assembled the staff necessary to prepare the required environmental impact statements.

Alco's complaint was severed from B&A's abandonment application and proceeded to hearings in November of 1973. On May 6, 1974, the Administrative Law Judge who presided at those hearings issued an Initial Decision in which he concluded that B&A had, "through the issuance of a temporary embargo, unlawfully abandoned all operations over its line in violation of section 1(4) and 1(18) of the [Interstate Commerce] Act," ordering it to cancel its embargo and to restore service. However, because "the Commission lacks jurisdiction under section

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[2] Section 1(4) imposes a duty on every common carrier to provide transportation upon reasonable request therefor (49 U.S.C. § 1(4)); Section 1(11) imposes a duty to furnish safe and adequate car service (49 U.S.C. § 1(11); and Section 1(18) provides that no railroad shall abandon a line of railroad, or operations thereover, without having obtained an appropriate certificate from the Commission (49 U.S.C. § 1(18)).

1(18) to remedy this wrong . . . the matter will be referred to the Bureau of Enforcement to bring a court action under section 1(20) seeking an injunction." The Administrative Law Judge also found that there had been no showing of a violation of Section 1(11).

The recommended court action was instituted by the Interstate Commerce Commission on July 25, 1974 in the United States District Court for the District of Maryland. On September 26, 1974, following hearings, that court granted Alco's motion for leave to intervene, but denied the Commission's request for a preliminary injunction. *Interstate Commerce Comm'n.* v. *Baltimore & Ann. R.R. Co.*, 64 F.R.D. 337 (D.Md. 1974).

On August 22, 1974, the Commission's Review Board No. 4 affirmed the Administrative Law Judge's findings that Alco had failed to show a violation of Section 1(11) and his holding that the Commission lacked jurisdiction to enforce Section 1(18), but reversed his conclusion that the Commission had jurisdiction to enforce Section 1(4). On January 16, 1975, Division 2 of the Commission denied Alco's petition for reconsideration of the decision of Review Board No. 4.[3]

On August 30, 1974, shortly after the decision of Review Board No. 4 and well before the decision of Division 2, Alco amended its complaint for injunctive relief in the District Court to include its claim for damages.

On March 11, 1975, the District Court heard testimony and argument directed to the merits of the permanent injunction requested both by the Commission and by Alco. On April 29, 1975, the District Court issued a Memorandum (Petition, App. B) in which it concluded (1) that B&A had unlawfully abandoned operations over its line of railroad and that even though B&A's applica-

[3] A division of the Commission consists of three of the eleven Commissioners (see 49 U.S.C. §17(1)).

tion for authority to abandon had become disentangled from environmental delays and was then in the hearing stage, a permanent mandatory injunction, requiring it to restore service over a six-mile segment to Alco's plant, should issue, and (2) that Alco's damage claim should be dismissed.

On April 19, 1976, the Fourth Circuit affirmed the District Court in both respects.[4]

Argument

Section 9 of the Act provides that any person claiming to be damaged by any common carrier may make complaint to the Commission or bring suit in federal court, but "must in each case elect which one of the two methods of procedure herein provided for he or they will adopt" (49 U.S.C. § 9; Petition, p. 35a).

In September 1972, Alco considered itself damaged by the cessation of B&A rail service to its plant. It decided to seek recovery of damages and it elected to adopt the procedure of making complaint to the Commission. Section 9 clearly applies so as to preclude Alco's subsequent efforts to bring its damage claim in federal court. The District Court and the Fourth Circuit so concluded, and properly so.

[4] B&A did not initially intend to seek this Court's review of the Fourth Circuit's affirmance of the mandatory injunction, as the denial by Mr. Chief Justice Burger on May 6, 1976, of B&A's application for a stay meant that the railroad would have been rehabilitated and service restored long before a decision by this Court could be obtained. In that circumstance, B&A's claim that the issuance of that injunction violated principles announced by this Court in *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920), would have been largely academic. B&A believed the litigation to be at an end. However, when B&A received on the last possible day Alco's petition for a writ of certiorari in respect of its damage claim, B&A promptly filed its petition for a writ of certiorari in respect of the findings of violation of the Act which form the basis of both the injunctive order and the damage claim.

Alco attempts to avoid the application of Section 9 by contending that because Division 2 of the Commission held that it lacked jurisdiction to award Alco damages for violation of Section 1(4), as well as Section 1(18), Alco's remedy at the Commission was nonexistent and for that reason it cannot be deemed to have made an election. Alco's claim that its remedy at the Commission was nonexistent is unfounded; its failure to recover damages in that forum was due to its own decisions.

On March 16, 1971, some eighteen months before Alco made complaint to the Commission, a sharply divided Commission issued a decision in which the majority concluded that the Commission lacks jurisdiction to enforce the duty imposed upon carriers by Section 1(4) of the Act—to provide transportation upon reasonable request therefor—and dismissed a shipper's claim of damages for violation of that section. *Duralite Co., Inc.* v. *Erie Lackawanna Ry. Co.*, 339 I.C.C. 312 (1971). There were four dissenting Commissioners, each of whom believed that the Commission did have power to enforce a carrier's Section 1(4) duty.

Alco must be presumed to have been aware of the *Duralite* decision and to have concluded that it was incorrectly decided or that, in view of the strong dissents, the Commission would reverse itself. Whatever its conclusions with respect to the *Duralite* decision, Alco elected to file its Section 1(4) damage claim with the Commission.

Alco did not, however, fully pursue that remedy. Immediately after an employee board (Review Board No. 4) issued its report concluding on the basis of *Duralite* that the Commission lacked jurisdiction to afford Alco any relief for a Section 1(4) violation, Alco amended its complaint in the District Court to raise its damage claim in that forum, while at the same time asking that the de-

cision of Review Board No. 4 be reconsidered. Thus, Alco elected not only to *initiate* its damage claim at the Commission, but it also attempted to *pursue* that claim both in the Commission and in the District Court. Section 9 was plainly intended to prevent such a duplicity of claims.

Having elected to proceed at the Commission, Alco should have followed through with that election. When Division 2 of the Commission denied its petition for reconsideration of the decision of Review Board No. 4, Alco could have (1) sought to have the matter considered by the full Commission by filing a petition for a finding that the case involved a matter of general transportation importance (49 C.F.R. § 1100.101(a)(4)), or (2) sought judicial review of that decision (28 U.S.C. § 2341). Alco did neither; instead, and even before the decision of Division 2, it switched forums, or adopted a new method of procedure, by amending its complaint in the District Court.

Thus, Alco's claim that its remedy at the Commission was nonexistent is without any basis whatever. As the District Court concluded, the ineffectiveness of Alco's remedy at the Commission was "due to its own inaction" (Petition, p. 29a) and it should not be permitted "to shuttle back and forth between the ICC and the courts" (*id.* at 31a).

Full pursuit of the remedy which Alco did adopt was entirely warranted in the circumstances: *First*, it was Alco's decision to proceed in that forum in the first instance; *Second*, the narrow decision in the *Duralite* case promised hope that the Commission might reverse itself; *Third*, the courts which have considered the question have indicated that the Commission does indeed have power to grant relief for violations of Section 1(4).[5]

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[5] In *New York Central Railroad Company* v. *United States*, 201 F.Supp. 958 (S.D.N.Y. 1962), the court, noting both the duty im-

Alco contends now that the dismissal of its damage claim involves important federal questions which should be settled by this Court, that the decision of the Fourth Circuit affirming that dismissal is in conflict with decisions and principles established by other Courts of Appeals, and that the Fourth Circuit decision is in conflict with prior decisions of this Court. As shown hereafter, there is no merit to these contentions.

I.

THE FOURTH CIRCUIT DECISION DOES NOT RAISE QUESTIONS WHICH NEED BE SETTLED BY THIS COURT

In its Petition (pp. 7-11), Alco suggests that the Fourth Circuit has decided two important questions which should be settled by this Court. The first "question"—in reality, an assertion by Petitioner—is that if a shipper's damage claim is denied by the Commission for lack of jurisdiction and if the election provision of Section 9 then bars a similar remedy in court, the shipper "is destined to be caught in the toils of a procedural dilemma" (Petition, p. 7). The second question is whether the doctrine of *res judicata* should be applied to an administrative order determining a question of subject matter jurisdiction.

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posed upon carriers by Section 1(4) and the Commission power under Section 13(2) to "make and enforce any order" (other than one for the payment of money), refused to set aside a Commission order annulling an embargo issued by the railroad. And in *Asbury* v. *Chesapeake and Ohio Railway Company*, 314 F.Supp. 310 (D.D.C. 1970), the court, whose "teachings" apparently prompted Alco to elect the Commission route (Petition, p. 8), stated only that the validity or reasonableness of embargoes, by which a railroad advises shippers that it is unable to perform its Section 1(4) duty, is "usually" left to a determination by the Commission (314 F.Supp. at 313).

A. Any "Procedural Dilemma" Was Entirely Of Petitioner's Own Making And Within Its Power To Resolve.

Petitioner's "procedural dilemma" rests on its assertion that *Asbury* v. *Chesapeake Co. Ry.*, 314 F.Supp. 310 (D.D.C. 1970) "taught" it that a shipper damaged by an embargo has no damage remedy in the District Court unless the embargo is first cancelled by the Commission (Petition, p. 8). Thus, Alco's argument proceeds, it purportedly followed the teaching of *Asbury* and filed its Section 1(4) damage claim with the Commission, only to have a panel of the Commission hold that it did not have jurisdiction under Section 1(4) to award it damages.

There was no "procedural dilemma." Alco misconstrued the *Asbury* decision; and it did not even follow what it now claims *Asbury* taught it.

Alco asserts that *Asbury* taught it that "a shipper damaged by an embargo has no damage claim in District Court unless the embargo is first cancelled by the Commission" (Petition, p. 8). But Alco didn't go to the Commission and ask that B&A's embargo be cancelled, thereafter to present its damage claim in court; instead, it made complaint with the Commission asking that B&A be ordered to cease and desist from violating Sections 1(4), 1(11) and 1(18) *and* seeking damages for such violations. Thus, even if Alco's reading of *Asbury* were correct, it did not proceed accordingly.

But Alco has not properly construed *Asbury* in any event. The *Asbury* court, in considering a shipper's Section 1(4) damage claim, stated only that the "validity or reasonableness of embargoes is *usually* left to a determination by the Commission" (314 F.Supp. at 313). Nonetheless, the court considered on the merits the challenge to the embargo, as well as the Section 1(4) damage claim — ". . . the plaintiff has not prevailed in court. The

embargo being lawfully invoked there are no damages to be recovered" (*id.*) Thus, *Asbury* created no "procedural dilemma"; it indicated only that an embargo could be challenged and a damage claim presented either to a court or before the Commission, but not both.

The fact that Alco was unsuccessful in securing an award of damages by the Commission was not because it was misled by *Asbury*, but rather because it chose not to test its own apparent conclusion that, notwithstanding the Commission's *Duralite* decision, that agency did have power to award its damages under Section 1(4) of the Act. As the District Court concluded: "For whatever reason, Alco decided not to pursue fully its initial choice. Alco therefore should not be allowed to begin again in another forum" (Petition, p. 29a). Accordingly, the fact that the parties did not " 'proceed to a determination before the Commission' on the merits," which in Alco's view (Petition, p. 9) is the only circumstance in which the election provisions of Section 9 can be applied, is due entirely to Alco's own tactical decisions.

B. *Res Judicata* Has No Application To The Circumstances Of This Case.

Alco next asserts (Petition, p. 9) that if the election provision of Section 9 is not applicable (the ultimate conclusion being presumed), the "decision below can be justified only if a final agency order determining a question of subject matter jurisdiction is *not res judicata* in a collateral proceeding" (Petition, p. 9). Alco's contention apparently is that once Division 2 of the Commission held that it did not have jurisdiction to award damages under Section 1(4), the matter is conclusive on anyone participating in that proceeding, including B&A, and upon the courts. Thus, in Alco's view, B&A may not contend in court, nor may the court itself consider, that Alco had made an election under Section 9.

Alco's contention wholly overlooks the fact that given two viable choices (and to this day we don't know if Alco's complaint to the Commission was or was not viable, since Alco chose not to test it), the election to proceed before the Commission ousts the District Court of jurisdiction. *Standard Oil Co.* v. *United States*, 283 U.S. 235, 240 (1931). Neither *res judicata* nor estoppel can operate to confer jurisdiction on the District Court. *Neirbo* v. *Bethlehem Shipbuilding Corporation*, 308 U.S. 165, 167-168 (1939).

Apparently recognizing that the application of the doctrine of *res judicata* to administrative proceedings has generally been limited to questions of fact (see, *e.g.*, *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966), Alco contends (Petition, p. 10) that the "time is now ripe" to apply *res judicata* to administrative determinations on questions of law (such as the agency's jurisdiction), suggesting that this Court's prior decisions in *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938), *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66 (1939), and *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940) provide a basis for doing so.

Nowhere does Petitioner explain the application of this trilogy of cases to the circumstances of this case. *Stoll* and *Treinies* do not even involve administrative proceedings, much less administrative proceedings initiated in the light of a statute requiring a choice of forums. *Stoll* held merely that a Bankruptcy Court order relieving a guarantor of his obligation (the court implicitly deciding that it had subject mater jurisdiction) was *res judicata* in a subsequent state court action to enforce the guarantee by a creditor who had notice of the bankruptcy pro-

ceedings. *Treinies* held that in a federal interpleader action involving inconsistent state court judgments (Idaho and Washington) the prevailing Washington court claimant who participated in the Idaho proceeding was bound by the determination of the Idaho court that the Washington court did not have jurisdiction of the subject matter.[6]

Adkins did involve an administrative agency; however, this Court held merely that the agency's determination (affirmed by the Court of Appeals, this Court denying certiorari) that plaintiff's coal was "bituminous coal" (subject to tax when sold by persons not members of the Coal Code) was *res judicata* in plaintiff's action in District Court to enjoin collection of the tax. The matter was not only *res judicata;* the Court held that the District Court did not even have jurisdiction to inquire into the nature of plaintiff's coal, since the administrative procedure was "exclusive" (310 U.S. at 404).

Thus, whatever may be said with respect to Petitioner's contention that this Court should extend the doctrine of *res judicata* to administrative determinations on questions of law, such as subject matter jurisdiction—a concept seemingly in conflict with the notion that questions of law are for courts to decide—plainly this is not the proper case for the Court to do so.

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[6] If *Treinies* can be said to have any application to this case, it suggests that Alco should have pursued its initial choice of forums to the "fullest extent," as the District Court below said it should have, before contending that its remedy at the Commission was nonexistent. In *Treinies*, the Court said (308 U.S. at 77):

> "If decided erroneously in the Idaho proceedings, the right to review that error was in those (the Idaho) proceedings. While Petitioner sought review from the decree of the Supreme Court of Idaho by petition for certiorari to this Court, which was denied, no review was sought from the final decree of the Idaho District Court of August 18, 1936, on new findings of fact and conclusions of law on remittitur from the Supreme Court of Idaho."

II.

THE FOURTH CIRCUIT DECISION IS NOT IN CONFLICT WITH DECISIONS OR PRINCIPLES OF OTHER COURTS OF APPEALS

Alco contends that the Fourth Circuit's decision is in conflict with the Third Circuit's decision in *Seatrain Lines, Inc.* v. *Pennsylvania Ry.*, 207 F.2d 255 (3rd Cir. 1953) and with principles established by the Second, Seventh and Ninth Circuits.

Seatrain is distinguishable. There, the Third Circuit held that a water carrier's action in federal court against certain railroads under the antitrust laws, based upon the refusal of railroads not in a through route relationship with Seatrain to make their cars available to Seatrain, was not subject to dismissal on the basis of primary jurisdiction. The court noted that in prior proceedings before the Interstate Commerce Commission, that agency had concluded that it had jurisdiction to require railroads in through route relationship with Seatrain to permit the unrestricted use of their freight cars; the Commission also concluded, at the urging of the railroads, that it did not have jurisdiction to impose such a requirement on railroads not in through route relationship with Seatrain. In response to Seatrain's antitrust action, the railroads argued in court, contrary to their argument before the Commission, that the Commission *did* have jurisdiction to regulate car interchange even in the case of railroads not in through route relationship with water carriers and that the case should be dismissed on the basis of primary jurisdiction. The Third Circuit rejected that contention, holding that "the question of Commission power over car withholdings by railroads not in through route relationship with Seatrain is foreclosed by the rulings already made by the Commission itself" (207 F.2d at 259).

The principle of *res judicata* or estoppel reflected in *Seatrain* has no application to this case. In *Seatrain*, the court case was brought under the antitrust laws, while the prior Commission proceedings involved the car service provisions of Section 1 of the Interstate Commerce Act; here, Petitioner brought precisely the same action in court which it had previously initiated with the Commission. More fundamentally, however, Section 9 was not at issue in *Seatrain*, as no claim of damages had ever been filed with the Commission; and, while the court in *Seatrain* was concerned with the doctrine of primary jurisdiction, the question here was whether in the light of Section 9 the District Court had jurisdiction at all to entertain Petitioner's damage claim. Thus, the Fourth Circuit's decision in no way conflicts with *Seatrain Lines, Inc.* v. *Pennsylvania Ry.*

Similarly, the Fourth Circuit's decision is not in conflict with principles established by the Second Circuit in *Dennison* v. *Payne*, 293 F. 333 (2d Cir. 1923), the Seventh Circuit in *Landreth* v. *Wabash R. Co.*, 153 F.2d 98 (7th Cir. 1946), and the Ninth Circuit in *Pillsbury* v. *Alaska Packers Ass'n*, 85 F.2d 758 (9th Cir. 1936).

Dennison v. *Payne*, insofar as it might be said to pertain to this case, decided only that where plaintiff initiates a proceeding for wrongful death of an employee with the State Board, even if only for the purpose of tolling the running of the statute of limitations, the resulting finding of the State Board that the employee was engaged in intrastate commerce and its award of damages (from which no appeal was taken) precludes plaintiff from recovering in federal court under the Federal Employers Liability Act based upon an allegation that the deceased employee was engaged in interstate commerce. The Fourth Circuit's decision in this proceeding is not inconsistent with the principles followed in *Dennison*.

Pillsbury v. *Alaska Packers Ass'n* holds merely that in admiralty a ship owner is not entitled to challenge in District Court after some 20 months a Federal Compensation Board's jurisdictional finding of employment in view of that provision of the Long Shore Men's and Harbor Worker's Compensation Act which provides that an action in District Court to set aside a Board order must be brought within 30 days.

Landreth v. *Wabash* involved a situation in which an employer initiated proceedings before the State Compensation Board seeking an adjudication with respect to injuries to one of its employees. The State Board made an award to the injured employee, implicitly finding that he was injured in intrastate commerce. The injured employee's appeal to the County Court was dismissed. In a subsequent action by the employee in federal court under the Federal Employers Liability Act, the employer moved to strike on the ground that the State Board had already found that the employee was engaged in intrastate commerce and had fully adjudicated the matter. The Seventh Circuit affirmed the dismissal of plaintiff's complaint on that basis. The court observed that plaintiff's problem was the determination in the state court that he was engaged in intrastate commerce and that if that determination was in error it

> ". . . could have easily been corrected by an appeal to the Supreme Court of Illinois. This remedy plaintiff did not choose to pursue and it is too late to raise it here" (153 F.2d at 100).

The Fourth Circuit's decision here in no way conflicts with *Landreth* v. *Wabash;* indeed, it fully accords with that decision.

Thus, contrary to Petitioner's contentions, the decision of the Fourth Circuit is not in conflict with the principles announced in these three cases.

III.

THE FOURTH CIRCUIT DECISION IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT

In its Petition (pp. 12-13), Alco contends that the Fourth Circuit has decided two federal questions in conflict with prior decisions of this Court. Specifically, Alco contends that dismissal of its claim based on B&A's common law duty to provide transportation service conflicts with this Court's recent decision in *Nader* v. *Allegheny Airlines, Inc.*, 44 U.S.L.W. 4803 (U.S. June 7, 1976) and that the dismissal of its claim against Jubb, B&A's president and allegedly an aider and abettor, conflicts with *Terminal Warehouse* v. *Pennsylvania Ry.*, 297 U.S. 500 (1936).

A. Dismissal of Petitioner's Damage Claim Is Not In Conflict With *Nader* v. *Allegheny Airlines*

In *Nader* v. *Allegheny Airlines*, this Court held that Nader's common-law tort action based on alleged fraudulent misrepresentation (failure to disclose overbooking practice) need not be stayed pending a determination by the CAB as to whether overbooking was a "deceptive practice" within the meaning of Section 411 of Federal Aviation Act of 1958. This Court noted that the lower court was not called upon to substitute its own judgment for that of the agency (as in a case involving the reasonableness of a rate) and held that the common-law action and the statute "are not 'absolutely inconsistent' and may coexist, as contemplated by" the savings clause provision of the Federal Aviation Act.

The *Nader* decision is inapplicable to the circumstances of this case. There are significant distinctions: (1) The Federal Aviation Act, unlike the Interstate Commerce

Act, does not contain an election of remedies provision;[7] (2) the common-law action in *Nader* was not identical with the involved statute—"Section 411 is both broader and narrower than the remedies available at common law" (44 U.S.L.W. at 4807). In this case, Section 1(4) of the Interstate Commerce Act merely codified the pre-existing common law duty of a carrier to provide transportation; Section 1(4) neither adds to nor takes from this duty. *Pennsylvania R. Co.* v. *Sonman S. C. Co.*, 242 U.S. 120 (1916); *United States* v. *Pennsylvania R. Co.*, 242 U.S. 208, 226-227 (1916).

Since Petitioner's common law claim is identical to its Section 1(4) claim, it cannot circumvent Section 9 by pursuing its common law claim in District Court after it has elected to pursue the same claim under Section 1(4) at the Commission.

B. Dismissal Of Petitioner's Damage Claim Against Jubb Is In No Way In Conflict With *Terminal Warehouse* v. *Pennsylvania Ry.*

When it switched forums in its effort to secure damages, Petitioner joined B&A's President, Elmer J. Jubb, as a defendant. Petitioner now claims that dismissal of its damage claim is in conflict with this Court's decision in *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U.S. 500 (1936).

Again, this Court's decision in *Terminal Warehouse* is inapplicable to the circumstances of this case. In that case, a warehouse company (Terminal) filed a complaint

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[7] Indeed, it would seem that no election could have been made in *Nader* in any event, as the Court noted that "individual consumers are not even entitled to initiate proceedings under § 411" (44 U.S.L.W. at 4807).

with the Commission against Pennsylvania Railroad claiming damages in respect of allegedly discriminatory arrangements made between that railroad and another warehouse company (Merchants). The Commission found that the challenged arrangements were discriminatory, but refused to award damages as the evidence was too indefinite for that purpose. Thereafter, Terminal brought an action against Merchants and the Railroad, alleging violations of the antitrust laws and seeking treble damages. This Court ultimately held that as to both Merchants and the Railroad whatever liability was incurred arose from discriminations violative of the Interstate Commerce Act, and not from the antitrust laws; and that, because the complaint was framed solely on a conspiracy in restraint of trade theory, it should have been dismissed as to both defendants (297 U.S. at 516-517).

As pertinent to this case, the Court held that Section 9 of the Interstate Commerce Act operated to bar Terminal's court action against the Railroad under the Act, but that the "situation was altogether different, however, in respect of the liability of Merchants and other aiders and abettors" as to whom damages were not sought before the Commission, thus "relieving us of the duty to inquire whether jurisdiction would have existed if such relief had been demanded" (297 U.S. at 508).

Thus, the Court indicated that an election under Section 9 to proceed at the Commission against the Railroad did not bar a subsequent court action against an "aider and abettor," that is, a separate party to the discriminatory arrangements being challenged. In so indicating, the Court was influenced by the fact that under the Interstate Commerce Act any person who "shall aid or abet" any common carrier in any unjust discrimination, of the type involved in *Terminal Warehouse*, shall be jointly and severally liable with that common carrier in any court action brought by the person discriminated against (49 U.S.C. § 10(4)).

The dismissal of Petitioner's claim against Jubb, an agent of B&A and not a separate party, in no way conflicts with *Terminal Warehouse* which rests upon an express provision of the Act making aiders and abettors in discriminatory practices jointly and severally liable. What Petitioner complains of in this case is an alleged breach of duty to provide transportation service upon reasonable request therefor. Under Section 1(4) of the Act, as well as under the common law, the duty to provide transportation service rests with the "common carrier" (49 U.S.C. § 1(4)); *Johnson* v. *Chicago, M., St. P. & P. R.R.*, 400 F.2d 968 (9th Cir. 1968). Jubb is not a "carrier," as defined in the Act (49 U.S.C. § 1(3)(a)); consequently, he has no duty to provide transportation service. Indeed, Jubb has no right to engage in transportation as a common carrier, as he has no certificate of public convenience and necessity authorizing him to do so (49 U.S.C. § 1(18)). Plainly, Jubb cannot be liable in damages for any breach by B&A of its duty under Section 1(4) to provide transportation service.

Thus, the dismissal of Petitioner's damage claim against Respondent Jubb does not conflict with *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*

Conclusion

Petitioner has failed to demonstrate that there are special and important reasons warranting review by this Court; its Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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